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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 393

CHRISTINE COLLINS, ET AL., PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE PRICE ADMINISTRATOR

OPINION BELOW

No opinion was rendered by the United States Emergency Court of Appeals in the disposition of this cause.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered August 9, 1945 (R. 36). The petition for a writ of certiorari was filed August 31, 1945, and was granted November 5, 1945 (R. 38). Jurisdiction of this Court rests on Section 204 (d) of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended

by the Stabilization Extension Act of 1944, 58 Stat. 632, 50 U. S. C. App., Supp. IV, 924 (herein sometimes called "The Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether under Section 203 (a) of the Emergency Price Control Act, as amended, a protest may properly be filed challenging the validity of certain provisions of a maximum price regulation in relation to completed transactions, after the provisions in question have been revoked by the Price Administrator or have been superseded by new regulations.

2. Whether the Price Administrator erred in dismissing the protest filed by petitioners without referring the protest, pursuant to Section 203 (c) of the Act, to a Board of Review for its consideration.

3. Whether the judgment entered by the Emergency Court of Appeals on December 19, 1945, in the case of *Collins, et al.* v. *Bowles,* Docket No. 231, holding the regulations involved to be valid, has rendered moot the issues presented in the case at bar.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in the Appendix, *infra.* The maximum price regulation involved and pertinent amendments thereto

appear in the Federal Register (7 F. R. 6006; 8 F. R. 1632, 11162).

STATEMENT

On May 4, 1945, petitioners, purporting to act under Section 203 (a) of the Emergency Price Control Act, as amended, *infra*, pp. 24–25, filed a protest with the Price Administrator challenging the validity of regulatory provisions governing maximum prices for the sale of whiskey as applied to certain sales of whiskey which had been consummated by petitioners in January, 1943. The prices for these sales had been governed by Maximum Price Regulation No. 193 (7 F. R. 6006), which, subsequent to the transactions and prior to the filing of the protests, was superseded by new regulatory provisions containing substantially different pricing techniques.[1]

[1] At the time of the transactions in question maximum prices for whiskey were established under Maximum Price Regulation No. 193 by the so-called "freeze" pricing method, requiring reference in the first instance to the price charged by the seller in March 1942, or in the absence of such a sale, to the maximum price of his most closely competitive seller. One of the objections set forth in the protest was that this type of control was invalid for uncertainty.

On February 3, 1943, by Amendment No. 4 to the Regulation (8 F. R. 1632) these provisions were superseded as to bulk whiskey by the establishment of dollars-and-cents maximum prices. On August 9, 1943, Maximum Price Regulation No. 445 (8 F. R. 11161) superseded the earlier regulation in its control over both bulk and packaged whiskey, preserving the dollars-and-cents prices for bulk whiskey first specified on February 3, 1943, and supplanting "freeze" prices for

The protest was dismissed by the Price Administrator on the ground that the protest procedure could not properly be invoked to test the validity of regulatory provisions which had been superseded prior to the filing of the protest (R. 21–26). For this reason, the Price Administrator did not consider the merits of petitioners' objections to these superseded provisions or refer the protest to a Board of Review for its consideration under Section 203(c) of the Act. Thereupon, petitioners filed a complaint with the Emergency Court of Appeals pursuant to Section 204(a) of the Act setting forth objections to this disposition of the protest (R. 1–19). The Emergency Court of Appeals, on motion by respondent, dismissed the complaint on the ground that it was without jurisdiction to entertain it (R. 36). This decision is the subject of the present review on certiorari.[2]

In June 1943 respondent instituted against petitioners a civil enforcement action in the United States District Court for the Western District of Kentucky under Section 205(e) of the Act to recover treble damages on account

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wholesalers and retailers with specified maximum markups over cost.

[2] Substantially the same question is involved in the decisions of the Emergency Court of Appeals in *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831, and in *Utah Junk Company* v. *Bowles*, 150 F. 2d 963. This Court has granted certiorari in both causes (Nos. 67 and 400, at the present Term).

of alleged violations of the regulations in connection with the sales in January 1943 of the bulk whiskey (R. 15–16). On July 9, 1945, petitioners filed in the district court an application under Section 204(e) of the Act for leave to file a complaint with the Emergency Court of Appeals setting forth objections to the regulatory provisions which the petitioners were alleged to have violated. The district court granted the application, and pursuant thereto petitioners filed a complaint with the Emergency Court of Appeals setting forth their objections to the regulations in question (E. C. A. Docket No. 231). All proceedings before the Emergency Court of Appeals were completed and on January 10, 1946, that court rendered its decision on the merits of petitioners' objections to the pertinent regulations, holding the regulations to be valid in all respects.

SUMMARY OF ARGUMENT

1. Section 203 (a) of the Emergency Price Control Act does not authorize the filing of a protest setting forth objections to the validity of price regulations which have been revoked or superseded prior to the filing of the protest, and the Emergency Court of Appeals has jurisdiction to entertain a complaint filed under Section 204 (a) of the Act only when the protest upon which it is based has been properly filed under Section 203 (a) thereof. Moreover, to require the Price Administrator to entertain protests concerned

solely with the validity of price regulations which have been revoked or superseded prior to the filing of the protest, would be inconsistent with the basic plan for protest proceedings and would compel a serious diversion from the Administrator's statutory duty to prevent inflation. The Congress has provided in Section 204 (e) of the Act the appropriate and exclusive remedy to be followed by persons concerned solely with the past validity of regulatory provisions, and the attempt to circumvent these statutory provisions by recourse to protest proceedings in situations like that in the present case might lead to difficult problems of judicial administration.

2. The Price Administrator did not err in dismissing petitioners' protest without referring it to a Board of Review for its consideration under Section 203 (c) of the Act. That section does not require that a protest which was improperly filed, and therefore subject to dismissal, be referred to a Board for its consideration, since it was the Congressional intention that the Board should review cases only on their merits.

3. The judgment entered by the Emergency Court of Appeals on January 10, 1946, in the case of *Collins, et al.* v. *Bowles,* Docket No. 231, holding valid the regulation to which petitioners object, has rendered moot the issues presented by the case at bar, since petitioners have now obtained a judicial review of the regulation involved.

ARGUMENT

In the case at bar the Emergency Court of Appeals dismissed petitioners' complaint without announcing the grounds for the dismissal other than to state that it was without jurisdiction to entertain the complaint. However, the principal issue presented in the case is whether the protest proceedings provided for in Section 203 (a) of the Emergency Price Control Act can be employed to test the validity of a price regulation which has been revoked, or which has been superseded by another substantially different regulation. It may be assumed, therefore, that the Emergency Court of Appeals dismissed the complaint in this case for the same reasons stated by it in its prior decision in the similar case of *Thomas Paper Stock Company* v. *Bowles,* 148 F. 2d 831, now pending on a writ of certiorari in this Court, No. 67 at the present Term. See also *Krause Milling Company* v. *Bowles,* 148 F. 2d 844 (E. C. A.).

I

THE COURT BELOW WAS CORRECT IN INTERPRETING THE EMERGENCY PRICE CONTROL ACT AS NOT PERMITTING THE FILING OF A PROTEST SOLELY FOR THE PURPOSE OF SECURING A DETERMINATION AS TO THE VALIDITY OF A REGULATION WHICH HAS BEEN REVOKED OR SUPERSEDED

As originally enacted, Section 203 (a) of the Emergency Price Control Act of 1942 (56 Stat. 31) provided that a protest to obtain administra-

tive reconsideration of the validity of a price regulation issued under that Act, might be filed by any person subject to such regulation within sixty days after the regulation was issued, or at any time after the expiration of the sixty days solely on a ground arising after the sixty days had expired. And Section 204 of that Act provided that any person aggrieved by the denial of a protest might obtain judicial review of the validity of the regulation by filing a complaint in the Emergency Court of Appeals created by that section, with a right to further review by this Court on a writ of certiorari. The judicial review provided for by the section was made exclusive.

By the Stabilization Extension Act of June 30, 1944, 58 Stat. 638 (hereinafter sometimes called "The 1944 Amendment"), the Congress, in amending the Emergency Price Control Act, changed the language in Section 203 (a), *infra,* p. 24, which governed the time for filing protests, by striking out the sixty-day provision and by providing that protests might be filed "at any time after the issuance of any regulation or order." Section 204 was also amended, *infra,* p. 28, by adding a new subsection (e)[3] wherein it was provided, *inter alia,* that in a criminal or civil proceeding brought under Section 205 of the Act, the defendant, notwithstanding the fact

[3] Section 204 (e) was again amended by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., but the amendment is not relevant to the issues in the case at bar.

that he had not filed a protest under Section 203 (a), might, with the consent of the district court, file a complaint in the Emergency Court of Appeals to test the validity of the price regulation involved in the enforcement proceeding, provided that the district court should find the objection to the regulation to have been made in good faith, and should also find reasonable and substantial excuse for the defendant's failure to file a protest under Section 203 (a).

Petitioners contend that under the amendatory language in Section 203 (a) they may employ the protest procedure to test the validity of a price regulation which has been superseded at the time they file the protest. This contention not only offends the language of Section 203 (a), but it is also in conflict with the entire procedure established by Sections 203 and 204 of the Act for obtaining administrative reconsideration and judicial review of price regulations. The nature of that procedure and the urgent considerations which led to its adoption by the Congress, were exhaustively reviewed by this Court in its decision in the case of *Yakus* v. *United States*, 321 U. S. 414, wherein it was held that the sixty-day period originally provided in Section 203 (a) of the Act for securing administrative reconsideration of price regulations was a legally adequate period, and that the exclusive procedure after protest under Section 203, provided in Section

204 for obtaining judicial review of the validity of such regulations, was sufficient to meet the requirements of due process of law.

Under Section 203 (a) of the Act only a person "subject to any provision" of a regulation is given the right to "file a protest specifically setting forth objections to any such provision." The natural meaning of this language is that the provision of the regulation in question regulates the business operations of the protestant at the time of the filing of the protest.[4] This construction

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[4] The requirement that the protestant be subject to a regulation at the time of the filing of the protest is reinforced by procedural regulations issued by the Price Administrator pursuant to Section 203 (a) of the Act. Procedural Regulation No. 1, issued February 12, 1942 (7 F. R. 971) provided (Rule 9): "A person is, for the purposes of this Regulation, subject to a provision of a maximum price regulation only if such provision prohibits or requires action by him." This construction, which has been continued (See Section 24 of Revised Procedural Regulation No. 1, 9 F. R. 5791), was expressly approved by the Emergency Court of Appeals in *Buka Coal Co.* v. *Brown*, 133 F. 2d 949.

Petitioners' contention that the imposition of penalties for past violations of a superseded regulation makes them subject to the regulatory provision in question is clearly untenable. It ignores the distinction pointed out by this Court in *United States* v. *Hark*, 320 U. S. 531, between the operation of the regulation and the continuing effect of the statute itself. Having violated the regulation, the petitioners, by virtue of the provisions of Section 4 (a) of the Act, became subject to statutory penalties, and that liability continued until cut off by the applicable statute of limitations.

Also there is no substance to petitioners' attempt to show that the General Maximum Price Regulation and Maximum Price Regulation No. 193 are still applicable to sales of whis-

is inescapable in the light of the entire plan established by the Emergency Price Control Act for administrative and judicial review of price regulations issued under that Act. An examination of that plan discloses numerous reasons for construing Section 203 (a) as authorizing the filing of a protest only for the purpose of presenting objections to regulations which are in force and effect at the time the protest is filed.

Section 203 provides that a protest filed under that section shall be acted upon by the Administrator within a reasonable time, but in no event more than thirty days after filing. If the Administrator does not act promptly, the protestant may obtain an order from the Emergency Court of Appeals requiring the Administrator to take action within a given time. If the Administrator does not act within the time fixed by the Court, the protest is deemed to have been denied. Thus, the section carries a command that objections to price regulations shall be disposed of expeditiously. This can only contemplate regulations which are in force and effect and which are controlling the protestant's business; otherwise

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key such as were involved in the protest proceeding. Section 2.1 of Maximum Price Regulation No. 445, upon which petitioners rely (Pet. Br. 17), permitted the older regulations to remain effective as to transactions, if any, which were outside the coverage of the new regulation. There is no question that transactions of the character with which petitioners were concerned were within the coverage of the new regulatory provisions (See footnote 1, *supra*, p. 3).

the unusual expedition required of the Administrator would be unnecessary. In the face of the gigantic statutory burden placed upon the Administrator to enforce price control and prevent inflation in time of war, it would be unreasonable, we submit, to impute to the Congress an intention to impose on the Administrator the additional and seemingly unnecessary task of going back and determining the validity of a multitude of superseded regulations, while the same Act mandatorily directs that the result in each case be achieved with a high degree of expedition.

The provisions of Section 204 which prescribe the procedure to be followed in obtaining judicial review by the Emergency Court of Appeals of the Administrator's denial of a protest, likewise contain strong implications that a regulation must be in force and effect in order to form the basis of a protest under Section 203 (a). The purpose of the Congress in creating the Emergency Court of Appeals and giving it exclusive jurisdiction to pass upon the validity of price regulations was to expedite final disposition of objections made to such regulations. See S. Rep. No. 931, 77th Cong., 2nd Sess., p. 7, and H. Rep. No. 1409, 77th Cong., 1st Sess., p. 11. Thus, again, expedition is sought because the protested regulation is presently operative. And the judicial relief provided, which is obtainable only in the special court, is that the regulation may be "enjoined

or set aside," in order to terminate the effectiveness of the regulation *in futuro*. This view is further supported by the provision in Section 204 (a) giving power to the Administrator to modify the regulation under attack while the complaint is pending before the Emergency Court of Appeals.[5] A further indication that the protest proceedings were established to deal solely with regulations actually in effect at the time the protest is filed is to be found in the provision in Section 204 (b) which postpones the effectiveness of a judgment of the Emergency Court of Appeals "enjoining or setting aside" any regulation until thirty days after its entry. In reporting on the bill which became the Emergency Price Control Act of 1942, the Committee on Banking and Currency of the Senate said concerning this provision:

> This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the

[5] This provision does not permit the Administrator to defeat judicial review of the validity of a regulation by a series of amendments or changes while a complaint is pending in the Emergency Court of Appeals. Where the issue has been timely raised that court will retain jurisdiction of the complaint and pass upon the validity of the regulation as it read prior to its amendment. See *Montgomery Ward & Co.* v. *Bowles*, 147 F. 2d 858 (E. C. A.).

United States Supreme Court. [S. Rep. No. 931, *supra*, p. 24.]

That protests were regarded as being appropriately lodged only against regulations in force and effect is further indicated by the Congressional understanding of the relief contemplated by the Price Administrator's "grant" of a protest. Section 203 (a) of the original bill (H. R. 5990, 77th Cong., 1st Sess.) was substantially identical to that section as enacted. In discussing the 30-day requirement for action by the Administrator, the Committee Report stated that the Administrator would grant a protest "by withdrawing or modifying the disputed regulation." (H. R. 1409, 77th Cong., 1st Sess.) This language clearly implies that the regulation would actually be in effect at the time of the Administrator's action.

All of the provisions discussed above and the legislative history of the Act point to the conclusion that the Congress intended the protest procedure to be employed only to secure modification of a regulation which has not been revoked or superseded at the time of the filing of the protest. And the practical considerations which lie behind this restriction on the use of the protest are obvious. The Price Administrator is required by the Act to formulate regulations, orders, and schedules necessary to effectuate control of the maximum prices to be charged in virtually all of the transactions involved in the entire national economy in a period of unprecedented

industrial and financial strain, and his mandate from the Congress is to prevent inflation. Frequent adjustments and modifications of the regulations are essential to achieve effective administration and to avoid disparate enforcement. Thus, with the passage of time the number of revoked and superseded regulatory provisions is certain to become multitudinous. Were these superseded regulations open to attack by protest, it can scarcely be doubted that an extremely large number of protests would be filed merely to obtain administrative, or ultimately judicial, declarations of the rights and liabilities of private parties growing out of transactions negotiated during the life of superseded regulations. Under those circumstances the Administrator might be required, during an economic crisis, to devote a large part of his time and effort to matters no longer germane to price control or inflation. Plainly, then, a holding that the Administrator must undertake to examine and pass upon protests filed against regulations which are no longer in existence, would compel a serious diversion from the Administrator's statutory duty to prevent inflation. That grave danger might lurk in any amendatory proposal which would require the Price Administrator to perform functions not absolutely necessary to effectuate the purposes of the Emergency Price Control Act, was recognized by the Congress when the bills which later became the 1944 Amendment were under consideration.

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In reporting on those bills (S. 1764 and H. R. 4941) the Committees on Banking and Currency of both the Senate and the House of Representatives issued a warning that proposed changes must be consonant with effective administration and enforcement of the Act. See S. Rep. 922, p. 12, and H. Rep. 1593, p. 6, 78th Cong., 2nd Sess.

Inability to file a protest after the objectionable features of a regulation have been administratively corrected does not deprive the defendant in an enforcement proceeding instituted under Section 205* of a reasonable opportunity to have the validity of the applicable regulation judicially determined. The Stabilization Extension Act of 1944 (58 Stat. 638) added to Section 204 of the Emergency Price Control Act the new subsection (e) pursuant to which a defendant in an enforcement proceeding who has failed to file a timely protest prior to the institution of the suit may bring the issue of the validity of the regulation directly to the Emergency Court of Appeals. Thus, since the 1944 Amendment, the Emergency Price Control Act has provided an additional avenue to reach the Emergency Court of Appeals for the purpose of obtaining judicial review of the validity of price regulations which become the basis of enforcement proceedings.

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*The 1945 amendment to Section 204 (e) referred to in Footnote 3, *supra*, p. 8, extended the protection of the provisions of this section to defendants in conspiracy actions brought pursuant to Section 37 of the Criminal Code.

The new procedure permits a defendant in an enforcement proceeding who has failed to obtain judicial review of the validity of the regulation involved through protest proceedings under Section 203 (a) and 204 (a), to seek judicial review by the Emergency Court of Appeals of the validity of the regulation without first exhausting the administrative remedy through protest, provided the court in which the enforcement proceeding is pending finds that the objection to the regulation is made in good faith and that there is reasonable and substantial excuse for the defendant's failure to present his objection in a prior proceeding under Section 203 (a). Petitioners contend (Pet. Br. p. 13) that this provision affords merely a cumulative right which does not interfere with an absolute right granted in Sections 203 (a) and 204 (a) to obtain a judicial review by the procedure there prescribed. We submit that the procedures prescribed in Sections 203 (a) and 204 (a), both before and after the 1944 Amendment, were designed by the Congress for the purpose of granting prospective relief only, and that only under Section 204 (e), which was added by the 1944 Amendment, can proceedings be instituted which are concerned solely with the validity of revoked or superseded regulations.

To allow recourse to the 203 (a) and 204 (a) procedure in cases such as this would permit circumvention of the limitations expressly set forth in the Act upon judicial determinations of the validity of maximum price regulations.

Thus, Section 204 (e) provides that a defendant in an enforcement action may secure leave to file a complaint with the Emergency Court of Appeals only with respect to objections found by the district court to be made in good faith and in regard to which reasonable and substantial excuse exists for the defendant's failure to present such objections in a protest. The Congress thereby clearly evidenced its intent not to open the door for indiscriminate attacks upon the validity of past regulations by those charged with their violation, but rather to limit the privilege to persons who can make the showing required by Section 204 (e) (1). A substantial inroad would be made upon this limitation if in cases such as the present, protest proceedings could be used in lieu of the procedures prescribed by Section 204 (e).

In addition, the use of a protest filed after the institution of an enforcement proceeding might give rise to serious problems of judicial administration. Section 204 (e) (2) prohibits the granting of stays in cases where, as in this case, the protest is filed after institution of the enforcement proceedings.[7] As a result of this

[7] Section 204 (e) (2) of the Act provides that the court in which an enforcement action under Section 205 is pending "shall stay the proceeding * * * (ii) during the pendency of any protest properly filed by the defendant under section 203 *prior* to the institution of the proceeding under section 205 * * *" (italics supplied). The subsection

prohibition against stays in such cases, enforcement proceedings and executions on the judgments therein might well be completed prior to the termination of protest and judicial review proceedings brought under Sections 203 (a) and 204 (a). As a consequence, any judicial determination as to the invalidity of the regulation involved would be wholly futile.

The suggestion in the dissenting opinion of Judge Laws in the *Thomas Paper Stock* case, *supra,* that to give to the original Act now an interpretation that would have prohibited the filing of a protest after the objections to the regulation stated in such protest had been corrected, would raise grave doubts as to its constitutional validity, is, we submit, fully answered by the decision of this Court in the *Yakus* case, *supra.*

II

THE PRICE ADMINISTRATOR DID NOT ERR IN DISMISSING PETITIONERS' PROTEST WITHOUT REFERENCE TO A BOARD OF REVIEW.

Petitioners suggest that the Price Administrator was in error in dismissing their protest without referring it under Section 203(e) of the Act to a Board of Review for consideration (Pet. Br. pp. 6, 10). Petitioners do not clearly state

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further provides: "Except as provided in this subsection, the pendency of any protest under Section 203 * * * shall not be grounds for staying any proceeding brought pursuant to section 205 * * *."

whether this contention is advanced as a ground for reversal which is independent of their contention that the protest should have been considered on its merits by the Price Administrator.[8] If the protest had been properly filed, petitioners would under Section 203 (c) have been entitled to consideration by a Board of Review. But the section does not contemplate such referral in the case of a protest which is subject to dismissal, since the right is limited to a "protest filed in accordance with subsection (a) of this Section" before "denial" by the Price Administrator. The statute thus expressly makes applicable the limitations upon the filing of protests set forth in Section 203 (a) of the Act. The legislative history[9] of this provision also makes it plain that Congress intended Boards of Review to be concerned with the merits of protest proceedings, and did not require the empty gesture of referring to a Board protests which have been improperly filed.

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[8] Petitioners did not list the alleged error of failure to refer the case to the Board of Review among the "Questions Presented" (Pet. Br. pp. 2–3). This point is, however, listed among the "Specifications of Error to be Urged." (*Id.*, p. 6.)

[9] See Senate Report No. 922, *supra*, pp. 10–11; 90 Cong. Rec. (June 6, 1944) 5366–7; Hearings, House Committee on Banking and Currency on H. R. 4376, 78th Cong., 2d Sess., (1944) p. 2170.

III

THE DECISION OF THE EMERGENCY COURT OF APPEALS IN THE CASE OF COLLINS ET AL. V. BOWLES, DOCKET NO. 231, HOLDING VALID THE REGULATION TO WHICH PETITIONERS OBJECT, HAS RENDERED MOOT THE ISSUES IN THE CASE AT BAR

In the "Memorandum for the Respondent" filed in response to the Petition for a Writ of Certiorari filed by petitioners in this case, attention was called to the fact that in the enforcement proceeding brought by respondent against petitioners in the United States District Court for the Western District of Kentucky on account of the sales of warehouse receipts for bulk whiskey, the petitioners had been granted leave by the district court under Section 204 (e) (1) of the Act to file a complaint with the Emergency Court of Appeals (Docket No. 231) setting forth the objections to the validity of the regulations which petitioners were alleged to have violated. It was suggested in that memorandum that the Petition for a Writ of Certiorari appeared to be concerned only with sales of bulk whiskey (Pet. 2–4; cf. Pet. Br. 4, 6), the issue which was then pending on the merits before the Emergency Court of Appeals, and that if this were so, a decision in the latter case might render moot the issues in the case at bar. It was indicated, however, that since the protest filed with the Price Administrator might have been construed as questioning

the validity of the regulation as applied to packaged liquors—a question not available to petitioners in the case pending on the merits in the Emergency Court of Appeals—there was a possibility that the present case would not become wholly moot.

The Emergency Court of Appeals has now rendered its decision on the merits of the complaint filed by petitioners with leave of the district court (Docket No. 231), and has sustained in all respects the validity of the regulation to which petitioners object in the case at bar.[10] We believe that the decision which the Emergency Court of Appeals has now rendered on the merits of the complaint filed under Section 204 (e), affords petitioners all of the relief which they might have obtained by a decision on the merits in the present proceeding. Since they have in fact secured a decision, albeit unfavorable on the merits, they have received the only relief that can be afforded them by this Court on the present writ of certiorari, and the writ should be dismissed on the ground that the cause has become moot. Cf. *St. Pierre* v. *United States*, 319 U. S. 41.

CONCLUSION

The judgment of the court below is correct and should be affirmed, or in the alternative, the writ

[10] Copies of the opinion are being lodged with the clerk.

of certiorari should be dismissed on the ground that the cause has become moot.

Respectfully submitted,

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FEBRUARY 1946

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, 58 Stat. 638, 50 U. S. C. App., Supp. IV, 923–924, are as follows:

* * * * * *

SEC. 203 (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,*[1] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[2] Statements in support of any such regulation,

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[1] As amended by sec. 106 of Stabilization Extension Act of 1944. The section formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

[2] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: *Provided, however, That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall, before denial in whole or in part, be considered by a board*

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[3] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

of review consisting of one or more officers or employees of the Office of Price Administration designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts would be adduced thereby, subpenas shall issue to procure the evidence of persons, or the production of documents, or both. The Administrator shall cause to be presented to the board such evidence, including economic data, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.[4]

* * * * *

SEC. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant

[4] Italicized provision added by section 106 of the Stabilization Extension Act of 1944.

to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other

evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the

docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in

which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment

setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.[5]

[5] Entire subsection (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

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SUPREME COURT OF THE UNITED STATES.

No. 393. OCTOBER TERM, 1945.

Christine Collins, A. J. Cummins, Yancey Lee Cummins and Edward J. Miller, Petitioners, vs. Paul A. Porter, Price Administrator.	On Writ of Certiorari to the United States Emergency Court of Appeals.

[April 22, 1946.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

Petitioners were stockholders in a distilling corporation on the dissolution of which in December, 1942, they received as their share of the assets warehouse receipts covering the bulk whiskey owned by the corporation. Early in January, 1943, they sold these receipts at a price above that fixed by the Administrator for bulk whiskey, Maximum Price Regulation 193, 7 Fed. Reg. 6006 (August 4, 1942), on the assumption that the receipts constituted "securities" expressly exempt from the pricing provisions.

On the basis of the sale of these certificates the Administrator, under § 205(e) of the Emergency Price Control Act, 56 Stat. 23, 34; 50 U. S. C. App. § 925(e), brought a suit for treble damages against the petitioner to recover approximately $6,800,000. That suit is still pending. In May, 1945, petitioners, invoking the authority of § 203(a), 56 Stat. 23, 31, 58 Stat. 632, 638; 50 U. S. C. App. § 923(a), sought to have the regulation on which the enforcement proceedings against them were based declared invalid or inapplicable by a protest filed with the Administrator. He dismissed it on the authority of *Thomas Paper Stock Co.* v. *Bowles*, 148 F. 2d 831, the ruling of which we have reversed in *Utah Junk Co.* v. *Porter*, decided this day. Petitioners then went to the Emergency Court, which dismissed the complaint without opinion, and we granted *certiorari*, 326 U. S. —. Prior to the petition for *certiorari*, petitioners obtained leave of the trial court in the treble damage action to file a complaint with the Emergency Court under § 204(e) of the Act, 58 Stat. 632, 639, 50 U. S. C.

App. § 925(e), and on January 10, 1946, that court sustained the validity of the regulation. *Collins* v. *Bowles*, 152 F. 2d 769.

The Government contends that the latter decision of the Emergency Court renders moot the judgment of that Court dismissing the complaint, which is the only judgment now before us. This Court is powerless to decide a case if its decision "can not affect the rights of the litigants in the case before it." *St. Pierre* v. *United States*, 319 U. S. 41, 42. The decision of this case may affect the rights of the litigants. The Emergency Court sustained the challenged regulation. It refused to pass on the applicability of the regulation to the petitioners. It left that question to the District Court before which the treble damage suit is pending. Had petitioners' contentions come before the Emergency Court through the protest proceedings under § 203(a) that court would have adjudicated both issues. *Conklin Pen Co.* v. *Bowles*, 152 F. 2d 764; *Collins* v. *Bowles*, *supra*. And in the event that the Emergency Court had found the regulation inapplicable and such decision had been made before a judgment was rendered in the District Court, its ruling would be binding upon the District Court. Under § 204(e)(2)(ii), consideration of a protest under § 203(a) is not a ground for staying the proceedings in the District Court, since the protest proceeding did not precede the suit in the District Court; and under the same provisions of the Act determination of the protest proceeding under § 203(a) can have no retroactive effect once the District Court has entered its judgment. But the opportunity for securing a decision from the Emergency Court through the protest proceeding before a judgment in the District Court is entered, has practical significance and makes this a living and not a hypothetical controversy.

On the merits the case is governed by our decision in *Utah Junk Co.* v. *Porter*. The petitioner in this case had a right to have his protest considered by the Administrator and, in case of denial, to resort to the Emergency Court of Appeals. The fact that Congress in 1944 gave a limited opportunity to go to the Emergency Court by leave of the District Court before which an enforcement proceeding is pending, § 204(e), neither repealed nor qualified the protest proceeding originally designed by § 203(a). The two modes of securing a hearing on the validity and applicability of the

price regulation are cumulative and not alternative. The Administrator advances no argument to distinguish the case from that of *Utah Junk Co.* v. *Porter*. His contention that the petitioner is not a "person subject to. . . . [the] regulation," § 203 (a), is amply refuted by the continuing liability of the petitioners, *United States* v. *Hark*, 320 U. S. 531, for some $6,800,000, should their arguments as to the invalidity and inapplicability of the regulation be rejected when the case is considered on the merits.

It is superfluous to discuss other issues raised in this case.

Judgment reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.